Ho Kok Thin & Anor v KMA Marketing Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–132 OF 1999-III(II)
DAVID WONG JC
23 JUNE 2006

Landlord and Tenant — Determination — Claim for damages — Whether defendant left demised premises in untenantable repair and condition — Whether sublease was continuation of previous tenancy — Whether defendant as subleasee was liable for damage caused by previous tenant

The plaintiffs were the landlords and registered proprietors of the demised premises. The original tenant was Lion Suzuki Motor Sdn Bhd ('Lion Suzuki') at a rental of RM8,000 per month. By virtue of a memorandum of sublease dated 20 November 1997, the defendant became the sublessee of the premises at a rental of RM12,000 monthly. By a letter dated 26 March 1998 the defendant gave to the plaintiffs three months' notice to run from 1 April 1998 to determine the sublease under the memorandum of sublease. Upon expiration of the notice, the defendant then yielded up on or about 1 July 1998 possession of the demised premises to the plaintiffs. The plaintiffs forfeited the defendants' deposit and claimed damages against the defendant on the ground that the defendant left the demised premises in an untenantable repair and condition. The crux of the defense was that upon determination of the sublease the defendant had restored the demised premises to its original state as it was when the defendant was given occupation of it by the plaintiff and even if there was a breach of the memorandum of sublease, the plaintiffs had not discharged their burden of proving that they had suffered loss and damages. The defendant also said that when it first moved into the demised premises, the interior and exterior of the demised premises was in an untenantable repair and condition and the defendant had incurred rectification expenses as particularized in its defence and counterclaim.

The plaintiffs submitted that the defendant was in law and fact estopped from denying that the memorandum of sublease was a continuation of the previous tenancy agreements between the plaintiffs and Lion Suzuki. The plaintiffs relied, inter alia, on the letter (exh P42) from one Mr Vincent Lee who made it a point to write that the defendant had been 'a very good tenant for the last five years'. The defendant however argued that the memorandum of sublease was in fact a new agreement between the plaintiffs and the defendant and it was entered into on the understanding that the plaintiffs would renovate and restore the demised premises to a tenantable state.

Held:

(1) There was no evidence to show why there was a 50% increase of the rental from RM8,000 to RM12,000. It was not reasonable for the defendant to accept an increase of 50% in monthly rental and be responsible for the damages caused by Lion Suzuki. On the contrary, it was more credible that the defendant accepted the increase with an understanding that the plaintiffs would repair the demised premises. Further, the conditions of the demised premises at the start of the memorandum of sublease (November 1997) were not the same as that at the start of the tenancy between the plaintiffs and Lion Suzuki (July 1992). To uphold the assertion of the plaintiffs would in fact infringe s 92 of the Evidence Act 1950 and also would be lifting the corporate veil of the defendant which the plaintiffs had failed to satisfy the conditions to do so (see para 21(i)–(iii)).

(2) Even if there was ambiguity in the interpretation of the cl (1)(5) of the memorandum of sublease — which provided that the sublessee shall be responsible for any damages caused to the demised premises by Lion Suzuki Sdn Bhd under its previous tenancy agreement — it should be read contra proferentum the plaintiffs as the tenancy agreement was drafted by their solicitors, M/s Chong Brothers and now being relied on by them. What that meant was that the plaintiffs could not say that the defendant was the alter ego of Lion Suzuki (see para 22).

(3) The letter from Mr Vincent Lee must be viewed together with the other evidence especially to the undisputed fact that Lion Suzuki and the defendant were separate legal entities from the same group of companies. Further the contents of P42 were hearsay evidence and if the plaintiffs wanted to use the same to prove their case, they should have called Mr Vincent Lee to testify what he actually meant by those words. The burden was on the plaintiffs to prove this fact as it was them who are alleging it (see para 23). The plaintiffs had also not shown nor attempted to show the special circumstances required for the court to lift the corporate veil of the defendant (see para 26). Therefore, the memorandum of sublease was a sublease between the defendant and the plaintiffs and not between a defendant who stepped into the shoes of Lion Suzuki and the plaintiffs. Hence the defendant's responsibility under the memorandum of sublease arose only from the date of the same which was 20 November 1997 (see para 27).

(4) The plaintiffs as admitted by PW1 had not inspected the demised premises in 1997 when the defendant moved in, hence there was no starting point upon which the plaintiffs need to use to prove what damages the defendant caused during its occupancy. Accordingly the court dismissed the plaintiffs' claim except as to the costs of removal of the rubbish which the defendant had wanted to do but prevented from doing so and costs of the repair of damages caused by the removal of electrical sockets, lights, air conditioners and wiring from the office (see para 29).

(5) In any event, even if the defendant was the alter ego of Lion Suzuki, the plaintiffs had failed to submit a detailed report of the condition of the demised premises when Lion Suzuki took occupancy in 1992. Landlords like the

plaintiffs must prepare a detailed written and pictorial report of the conditions of the rented property for the tenants to sign and acknowledge before the start of the tenancy and another joint inspection of the rented property at the end of the tenancy. The court was left to but could not speculate what the conditions of the demised premises were and whether or not the damages were from 'wear and tear' or otherwise. Nor was there any proof of whether or not the repairs were necessary or whether or not the repairs had restored the demised premises to the same conditions as at 1992. Nor was there any proof that the damages had been caused by Lion Suzuki (see para 30).

(6) Clause III(3) of the memorandum of sublease stated that the defendant/sublessee could terminate the sublease by giving three months notice to the plaintiffs/sublessors who shall be entitled to forfeit the deposit of RM36,000 ('deposit'). There was no dispute that the defendant gave a notice to terminate pursuant to cl III(3) by a letter dated 26 March 1998 (exh P43). The defendant's contention was that because of the plaintiffs' failure to repair the demised premises, the plaintiffs was not entitled to forfeit the deposit and the sum of RM12,000 being the outstanding rental for the month of June 1996 should be offset against the deposit. This contention was inconsistent to exh P43, para 6 the statement of agreed facts and the defendant's failure to claim for the balance of RM24,000. Therefore, the plaintiffs had lawfully forfeited the deposit (see para 31).

(7) In respect of the defendant's counterclaim, the defendant did not attempt to prove it and by implication had abandoned the counterclaim (see para 32).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pemilik tanah dan tuanpynya berdaftar premis demis. Penyewa asalnya adalah Lion Suzuki Motor Sdn Bhd ('Lion Suzuki') pada kadar sewa RM8,000 sebulan. Menurut memorandum pajakan kecil bertarikh 20 November 1997, defendan menjadi pemajak kecil premis itu pada kadar sewa RM12,000 setiap bulan. Melalui surat bertarikh 26 Mac 1998, defendan memberikan notis tiga bulan kepada plaintif-plaintif yang bermula dari 1 April 1998 untuk menentukan pajakan kecil di bawah memorandum pajakan kecil itu. Setelah tamat tempoh notis itu, defendan kemudian telah pada 1 Julai 1998 menyerahkan milikan premis demis kepada plaintif-plaintif. Plaintif-plaintif telah mengambil deposit defendan-defendan dan menuntut ganti rugi terhadap defendan atas alas an bahawa defendan telah meninggalkan premis demis dalam keadaan yang tidak sesuai untuk disewa. Inti pati pembelaan tersebut adalah bahawa penentuan pajakan kecil defendan telah mengembalikan premis demis itu kepada keadaan asalnya seperti ianya semasa defendan diberikan untuk menetap oleh plaintif dan jikapun terdapat pelanggaran memorandum pajakan kecil, plaintif-plaintif tidak melepaskan beban mereka membuktikan bahawa mereka telah mengalami kehilangan dan kerugian. Defendan juga mengatakan bahawa apabila ia pertama kali masuk ke premis demis itu, reka bentuk dalaman dan luaran premis demis itu berada dalam keadaan yang tidak sesuai untuk disewa dan defendan telah menanggung perbelanjaan pengubahsuaian seperti yang dinyatakan dalam pembelaan dan tuntutan balasnya. Plaintif-plaintif berhujah bahawa defendan dari segi undang-undang dan fakta

diestopkan daripada menafikan bahawa memorandum pajakan kecil itu adalah sambungan perjanjian sewa antara plaintif-plaintif dan Lion Suzuki. Plaintif-plaintif bergantung, antara lain, pada surat (eksh P42) daripada Encik Vincent Lee yang mengutuskan bahawa defendan merupakan 'a very good tenant for the last five years'. Defendan bagaimanapun berhujah bahawa memorandum2 pajakan kecil itu pada hakikatnya merupakan perjanjian baru antara plaintif-plaintif dab defendan dan ia telah disempurnakan atas persefahaman bahawa plaintif-plaintif akan mengubahsuai dan mengekalkan premis demis itu kepada keadaan yang sesuai untuk disewakan.

Diputuskan:

(1) Tiada keterangan menunjukkan bahawa kenapa terdapat peningkatan 50% sewa daripada RM8,000 kepada RM12,000. Ia tidak munasabah untuk defendan menerima peningkatan 50% untuk sewa bulanan dan bertanggungjawab untuk kerugian yang disebabkan oleh Lion Suzuki. Sebaliknya, ia boleh lebih dipercayai bahawa defendan menerima peningkatan itu dengan persefahaman bahawa plaintif-plaintif akan membaiki premis demis itu (lihat perenggan). Bahkan keadaan premis demis pada mula memorandum pajakan kecil (November 1997) tidak sama seperti pada permulaan penyewaan antara plaintif-plaintif dan Lion Suzuki (Julai 1992) (lihat perenggan). Untuk mengekalkan penegasan plaintif-plaintif sememangnya melanggar s 92 Akta Keterangan 1950 dan juga akan membuka perlindungan korporat defendan yang plaintif-plaintif telah gagal untuk mematuhi syarat-syarat untuk berbuat sedemikian (lihat perenggan 21(i)–(iii)).

(2) Jikapun ketaksaan dalam pentafsiran kl (1)(5) memorandum pajakan kecil — yang memperuntukkan bahawa pemajak kecil hendaklah bertanggungjawab untuk apa-apa kerosakan yang disebabkan kepada premis demis oleh Lion Suzuki Sdn Bhd di bawah perjanjian penyewaan sebelumnya — ia hendaklah dibaca contra proferentum seperti perjanjian penyewaan yang didrafkan oleh peguam mereka. Tetuan Chong Brothers dan sekarang bergantung kepadanya oleh mereka. Apa yang dimaksudkan adalah bahawa plaintif-plaintif tidak boleh mengatakan bahawa defendan adalah alter ego Lion Suzuki (lihat perenggan 22).

(3) Surat daripada En Vincent Lee hendaklah dilihat bersama dengan keterangan lain khususnya fakta yang tidak dipertikaikan bahawa Lion Suzuki dan defendan merupakan entiti berasingan daripada kumpulan syarikat yang sama. Bahkan kandungan P42 adalah keterangan dengar cakap dan jika plaintif-plaintif ingin menggunakannya untuk membuktikan kes mereka, mereka sepatutnya menelefon En Vincent Lee untuk memberi keterangan apa yang beliau maksudkan dengan perkataan-perkataan tersebut. Beban terletak atas plaintif-plaintif untuk membuktikan fakta ini kerana mereka yang telah mengatakannya (lihat perenggan 23). Plaintif-plaintif juga tidak menunjukkan maupun cuba menunjukkan keadaan istimewa yang dikehendaki gar mahkamah mengangkat tudung korporat defendan (lihat perenggan 26). Oleh itu, memorandum pajakan kecil merupakan pajakan kecil antara defendan dan plaintif-plaintif dan bukan antara defendan yang bertindak untuk Lion Suzuki dan plaintif-plaintif. Justeru itu tanggungjawab defendan

di bawah memorandum pajakan kecil timbul hanya daripada tarikh sama iaitu 20 November 1997 (lihat perenggan 27).

(4) Plaintif-plaintif seperti diakui oleh PW1 tidak memeriksa premis demis itu pada 1997 apabila defendan masuk, oleh itu tiada masa permulaan di mana plaintif-plaintif perlukan gunakan untuk membuktikan kerosakan yang dilakukan oleh defendan semasa penetapannya. Sewajarnya mahkamah menolak tuntutan plaintif-plaintif kecuali kos pengalihan sampah yang ingin dilakukan oleh defendan tetapi dihalang daripada berbuat demikian dan kos membaiki kerosakan yang disebabkan oleh pengalihan soket, lampu, alat pendingin udara dan litar wayar daripada pejabat (lihat perenggan 29).

(5) Dalam apa keadaan, jikapun defendan merupakan alter ego Lion Suzuki, plaintif-plaintif telah gagal untuk mengemukakan laporan terperinci keadaan premis demis apabila Lion Suzuki masuk menyewa pada 1992. Pemilik tanah seperti plaintif-plaintif hendaklah menyediakan laporan bertulis yang terperinci dan bergambar tentang keadaan hartanah yang disewa untuk penyewa-penyewa tandatangan dan mengakui sebelum penyewaan bermula dan satu lagi pemeriksaan bersama hartanah yang disewa di akhir penyewaan itu. Mahkamah tiada pilihan tetapi untuk mengandaikan keadaan premis demis itu dan sama ada atau tidak kerosakan adalah disebabkan 'wear and tear' atau sebaliknya. Maupun terdapat apa-apa bukti sama ada atau tidak pembaikan adalah perlu atau sama ada atau tidak pembaikan itu telah mengembalikan premis demis itu kepada keadaannya yang asal seperti pada tahun 1992. Maupun terdapat apa-apa bukti bahawa kerosakan telah disebabkan oleh Lion Suzuki (lihat perenggan 30).

(6) Klausa III(3) memorandum pajakan kecil menyatakan bahawa defendan/pemajak kecil boleh menamatkan pajakan kecil itu dengan memberikan notis tiga bulan ikepada plaintif-plaintif/pemberi pajakan kecil yang berhak mengambil deposit RM36,000 ('deposit tersebut'). Tiada pertikaian bahawa defendan telah memberikan notis penamatan menurut kl III(3) melalui sepucuk surat bertarikh 26 Mac 1998 (eksh P43). Hujah defendan adalah bahawa disebabkan kegagalan plaintif-plaintif untuk memperbaiki premis demis itu, plaintif-plaintif tidak berhak untuk mengambil deposit tersebut dan jumlah RM12,000 yang merupakan baki sewa yang tertunggak untuk bulan Jun 1996 hendaklah menjadi imbangan (offset) terhadap deposit tersebut. Hujah ini tidak konsisten dengan eksh P43, perenggan 6 penyataan tuntutan fakta yang dipersetujui dan kegagalan defendan untuk menuntut baki RM24,000. Oleh itu, plaintif-plaintif telah sah mengambil deposit tersebut (lihat perenggan 31).

(7) Berhubung tuntutan balas defendan, defendan tidak mencuba untuk membuktikannya dan secara implikasi telah meninggalkan tuntutan balas itu (lihat perenggan 32).]

Notes

For cases on determination of claim for damages generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 850–1012.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd [2005] 6 MLJ 593 (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 171 (refd)

New Chew v KBC Sawmill Sdn Bhd & Anor & another case [1998] 1 CLJ Supp 49 (refd)

Perman Sdn Bhd v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97 (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 AMR 410 (refd)

Tan Cheng Hock v Chan Thean Soo & Anor [1987] 2 MLJ 479 (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)

Legislation referred to

Civil Law Act 1956
Companies Act 1965
Evidence Act 1950 ss 92, 101

James Lo (George Lo & Partners Advocates) for the plaintiffs.
John Shek (Sandra Shek with him) (John Shek, Sigar, Wee Yee & Co) for the defendant.

David Wong JC:

THE PROCEEDINGS

[1] The proceedings arise out of a claim by the plaintiffs for damages allegedly caused by the defendant to a parcel of land together with the buildings thereon and appurtenances thereof situate at 2 1/2 mile, Pending Road, Kuching containing an area of 3,909 square metres more or less and described as Lot 1096 Section 64 KTLD during the defendant's occupation of the same pursuant to a memorandum of sublease dated 20 November 1997 between the plaintiffs and the defendant. The plaintiffs rely on cl I(5) in the memorandum of sublease to ground their claim.

STATEMENT OF AGREED FACTS

[2] The defendant, KMA Marketing Sdn Bhd, is a company incorporated under the Companies Act 1965, with a registered address at SEDCO Industrial Estate, Batu 5 1/2, Tuaran Road, Kota Kinabalu and one of its directors is Phang Wai Yeen.

[3] The subject matter of this suit is a memorandum of sublease concerning all that parcel of land together with the buildings thereon and appurtenances thereof situate at 2 1/2 mile, Pending Road, Kuching containing an area of 3,909 square metres more or less and described as Lot 1096 Section 64 KTLD ('the demised premises').

[4] The bundle of agreed documents filed herein dated 8 January 2002 describes the chain of tenancies/subleases concerning the demised premises as follows: **A**

(i) Tenancy agreement dated 23 July 1992:

> At the material time, the Landlords/ registered proprietors of the demised premises were Ho Kok Thin (the first plaintiff) and Than Ah Loh @ Than Boon Chong. The tenant was Lion Suzuki Motor Sdn. Bhd. ('Lion Suzuki'). **B**
>
> The period of tenancy was from 1 July 1992 to 30 June 1995 and the monthly rental was RM6,000.
>
> This tenancy agreement was signed by the said Ho Kok Thin and Than Boon Chong as Landlords and by Phang Wai Yeen for and on behalf of Lion Suzuki as tenant. **C**

(ii) Agreement dated 28 July 1995:

> At the material time, the landlords/ registered proprietors of the demised premises were the said Ho Kok Thin and Than Boon Chong.
>
> The tenant was Lion Suzuki. **D**
>
> The tenancy period was from 1 July 1995 to 30 June 1997 and the monthly rental was RM8,000.
>
> This Agreement was signed by the said Ho Kok Thin and Than Boon Chong as Landlords and by Phang Wai Yeen for and on behalf of Lion Suzuki as Tenant. **E**

(iii) Memorandum of sublease dated 20 November 1997:

> At the material time, the sublessors/ registered proprietors of the demised premises became Ho Kok Thin (the first plaintiff) and Lim Vei Na (f) (the second plaintiff).
>
> The Sublessee became KMA Marketing Sdn. Bhd. (the defendant). **F**
>
> The sublease period was from 1 July 1997 to 30 June 2000 and the monthly rental was RM12,000.
>
> This memorandum of sublease was signed by the first and second plaintiffs as sublessors and executed under common seal by the defendant as sublessee. **G**

[5] By the said memorandum of sublease, the defendant covenanted, inter alia, as follows:

(i) to pay the said monthly rental of RM12,000 in advance on or before the fifth day of each calendar month without deduction whatsoever; **H**

(ii) to keep the interior of the demised premises including doors, windows, pipes and also the roof, main walls and the exterior of the demised premises in good and tenantable repair and condition (fair wear and tear excepted) and to do such structural repairs to the demised premises as may be necessary;

(iii) not to dismantle and remove any fixtures fitted and installed by the defendant at the expiry or sooner determination of the term thereby created, unless otherwise directed by the plaintiffs; **I**

A (iv) at the expiration or sooner determination of the sublease thereunder to peacefully surrender vacant possession of the demised premises and yield up the demised premises in such good and substantial repair as shall be in accordance with covenants of the defendant therein contained and to remove, at the defendant's own costs, all furniture on the demised premises belonging to the defendant and to make good any damage caused thereby.

B

[6] The said memorandum of sublease further provides, inter alia, that the defendant may if it so desired determine the sublease before the expiration of the term granted thereunder and of such its desire shall give to the plaintiffs at least three months' notice in writing and shall up to the date of such determination pay the rent and reasonably perform and observe all the covenants on its part therein contained, then immediately on the expiration of the said three months' notice the term thereby granted shall thereupon cease and the deposit shall be forfeited to the plaintiffs but without prejudice to the claim of the plaintiffs in respect of any antecedent breach of the defendant's covenants therein contained.

C

D

[7] By a letter dated 26 March 1998, the defendant gave to the plaintiffs three months' notice to run from 1 April 1998 to determine the sublease under the said memorandum of sublease. Upon expiration of the said notice, the defendant then yielded up on or about 1 July 1998 possession of the demised premises to the plaintiffs.

E

STATEMENT OF ISSUES TO BE TRIED

(1) Whether the deposit has been lawfully forfeited to the plaintiffs and, therefore, whether the rental for June 1998 in the sum of RM12,000 is due and owing from the defendant.?

F

(2) Whether the defendant left the demised premises in an untenantable repair and condition as particularized in the plaintiffs' statement of claim at para 6(c) or whether, 'at the material time when the defendant first moved into the demised premises, they found the interior and exterior of the demised premises in an untenantable repair and condition' as particularized in the defendants' defence and counterclaim at para 4.?

G

(3) Depending on whether the plaintiffs or the defendant are liable for the untenantable repair and condition of the demised premises, whether the plaintiffs incurred the rectification expenses particularized at para 7 of the statement of claim or whether the defendant incurred the rectification expenses particularized at para 5 of the defence and counterclaim.?

H

DEALING WITH THE ISSUES

I

[8] It is trite law that the burden of proving the relevant facts lies with those who allege that their rights had been infringed and want the court to give judgment for loss suffered as a result of the aforesaid infringement. This is provided for by s 101 of the Evidence Act 1950 which provides as follows:

101. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

CLAIMS

[9] The plaintiffs' claim is as follows (verbatim):

(a) judgment for the sum of RM12,000 under para 5;

(b) judgment for the sum of RM342,091.41 under para 7.

[10] In respect of the claim for RM12,000, it concerns cl III(3) of the memorandum of sublease.

[11] As for the claim of RM342,091.41 the particulars are as follows:

	Particulars	
(i)	Cost of electrical re-wiring of the demised premises	RM 8,880.00
(ii)	Cost of roofing replacement works for covered driveway of the demised premises	RM 18,782.40
(iii)	Cost of fascia cladding replacement works and gutter replacement works for covered driveway of the demised premises	RM 4,940.00
(iv)	Cost of drainage improvement and repair works of the demised premises	RM 17,175.00
(v)	Cost of GI barriers along side retain wall of demised premises	RM 1,950.00
(vi)	Cost of supply and installation of MS Main entrance gate and MS fencing works fronting Jalan Pending of demised premises	RM 15,500.00
(vii)	Cost of repair and enhancement of existing concrete floor for driveway and apron of demised premises	RM 88,124.01
(viii)	Cost of demolition of damage septic tank and construction of new septic tank of demised premises	RM 3,630.00
(ix)	Cost of demolition and removal of mass concrete footing for signage	RM 1,250.00
(x)	Cost of repair of corroding steel columns for covered driveway of demised premises	RM 650.00

	BALANCE C/F	RM 160,881.41
	BALANCE B/F	RM 160,881.41
(xi)	Cost of demolition of chain-link fencing of demised premises	RM 500.00
(xii)	Cost of supply replacement of damaged plywood fascia for front office of demised premises.	RM 1,450.00
(xiii)	Cost of cleaning of trees and shrubs below front retaining wall of demised premises	RM 150.00
(xiv)	Cost of clearing debris and waste for offices workshop and yards of demised premises	RM 2,950.00
(xv)	Cost of patching up of air-condition opening of demised premises	RM 95.00
(xvi)	Cost of clearing blocked gutters for main roofs over office and workshop, repairing water down pipe and sealing of leakage with silicone as temporary measures of demised premises	RM 1,375.00
(xvii)	Cost of main roof replacement works, gutter replacement works of demised premises	RM 83,070.00
(xviii)	Cost of wall cladding replacement works of demised premises	RM 24,180.00
(xix)	Cost of repairing works for workshop floor of demised premises	RM 21,840.00
(xx)	Cost of repairing offices of demised premises	RM 45,600.00
	Total	RM 342,091.41

[12] The plaintiffs through their counsel's submission however abandoned items (vi) RM15,500, (xi) RM500, (xiii) RM150, and (xvi) RM1,.375 which totals RM17,525. Hence, the total claim is now RM324,566.41.

DEFENSE

[13] The crux of the defense is that upon determination of the sublease the defendant had restored the demised premises to its original state as it was when the defendant was given occupation of it by the plaintiff and even if there is a breach of the memorandum of sublease, the plaintiffs had not discharged their burden of proving that they had suffered loss and damages.

[14] In my view, the plaintiffs' case depends on the interpretation of cl I (5) in the memorandum of sublease (p 11 of exh P41) which provides as follows:

to keep the interior of the demised premises including doors, windows, pipes and also the roof, main walls and the exterior of the demised premises in good and tenantable repair and condition (fair wear and tear excepted) and to do such structural repairs to the demised premises as may be necessary.

[15] In his evidences (NOP/52 line 13 to NOP/53 line 2), PW1 said these:

Q: Did you go to inspect the premises after the end of the agreement and before the start of the third agreement?

A: I did not.

Q: Isn't it normal for yourself as landlord to go and inspect the premises when the tenant is changed?

A: In usual case, I will go to inspect if there is a change of tenant. But in this case, I was told that it was the same tenant that was why I did not go and inspect.

Q: (Refer to exh P41, p 11). Look at cl (I) (5). Was this clause included by you?

A: Yes, it was upon my request for this clause to be included.

Q: This clause appears to put a stringent condition on the sub lessee, why did you request to include such a clause?

A: Because they changed the name of the company in the tenancy and they also told me that they are of the same company, so I made that request so that they have to continue to bear the responsibility to comply with all the conditions that were stated since the tenancy in 1992.

Q: Did KMA raise any objection before signing the agreement to this clause?

A: They did not because if they did, I would follow the usual procedure, ie to ask them to move out from the premises and after my inspection, then they can move in.

Q: It is also in the agreed bundle (exh P41) that the rental increased from RM8,000 in the second agreement to RM12,000 in the third agreement. What was the defendant's response when you said you wanted to increase the rental?

A: The defendant did write a letter to my lawyer requesting for RM10,000 stating that during all these years we have been maintaining a good and friendly relationship.

Q: (Refer to encl 35). You know if this letter is in the bundle which we have filed in court?

A: Yes, at p 2.

Q: Can you tell the court, what is this letter?

A: The defendant wrote to my lawyer Messrs Chong Brothers, dated 27 June 1997.

Mr Lo: May I have this marked as an exhibit?

Mr Shek: No objection.

Court: Page 2 of encl 35 is marked as exh P42.

Q: When KMA terminated the agreement, did they give any reason?

A: They wrote a letter to my lawyer, Messrs Chong Brothers stating that because of the economics crisis and they could not continue the tenancy.

Q: Is this letter in your bundle, encl 35?

A: Yes.

Q: (Refer p 9). Can you tell the court, what is this?

A: This is the letter from the defendant to Messrs Chong Brothers, dated 26 March 1998.

[16] The above testimony is supposed to prove the followings:

(i) That the defendant was in fact stepping into the shoes of the previous tenant, Lion Suzuki and for all intents and purposes as far as the plaintiffs are concerned the memorandum of sublease was a continuation of the previous tenancy between the plaintiffs and Lion Suzuki.

(ii) That the defendant is estopped from asserting that the memorandum of sublease is a complete new agreement between the plaintiffs and the defendant.

(iii) The presence of cl I(5) in the memorandum of sublease confirms PW1's contention.

[17] The defendant disputes the above contention and contends that the memorandum of sublease is in fact a new agreement between the plaintiffs and the defendant and it was entered into on the understanding that the plaintiffs will renovate and restore the demised premises to a tenantable state. This is how DW4 puts it in DW4-A:

3 I have been working for KMA Marketing Sdn Bhd Kuching Branch since 1992–1993. At first, our office was at Jalan Pending, Kuching, Sarawak.

4 During the year 1997, our Sabah head office wanted to expand the market to Sarawak in a large scale. I was asked to look for a place to keep the shipment of cars. As the shipment involved a lot of vehicles, we need a large 18 space. So I was ordered to look for a big place to accommodate the vehicles but at that time it was very difficult to find. Somehow we heard that the Lion group wanted to move out from Lot 1096 Section 64 Kuching Town Land District. Then I approached one of the landowners, Mr Ho Kok Thin (the plaintiff), who was a friend of mind. He agreed to rent it to the company for a monthly rental of RM4,000 per month.

5 Mr Ho Kok Thin brought me to see the place and I found that the place was big but in a shabby state. I told Mr Ho Kok Thin that RM4,000.00 was a bit expensive for that kind of run down place. Mr Ho said never mind he would repair the place for me. So an agreement was drawn up and I sent the agreement to the Lion group office in Sabah for the directors to sign as the directors had full trust in me. The directors never came to visit the place. They only signed the agreement because they trusted me.

6 We moved in some on 1 July 1997 with the understanding that Mr Ho would do the repair later. So when the vehicles came from Sabah we put them all in the compound, the showroom and the workshop.

7 One week after we had moved in, it started to rain and the showroom and the workshop were leaking. I was told by the staff-in-charge of the showroom, workshop that the place was leaking tremendously and was covered with water. There was also short circuit in the office. The rain made the workshop slippery and the vehicles in the show room dirty. My staff had to clean them each time when it rained. I told and requested Mr Ho to come to repair the place and he told me that he would come later. However, he never turned up. I kept on asking him to come but he never came. Finally I got fed up and asked Flora to talk to him. At the meantime, we did some repairs and they costs about RM19,586.

[18] What I have before me is two conflicting sets of oral evidences. In dealing with such a situation, I am guided by what was said in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 by Chang Min Tat J at p 230:

> For myself, 1 would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[19] And also I concur with the sentiments expressed by what Edgar Joseph Jr J (as he then was) in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at pp 479–480 said:

> In arriving at my finding as to credibility, I did not rely solely on demeanour for that has to be balanced against the rest of the evidence and the probabilities of the case.
>
> It may be well to also remember what was said by Lord Wright and often quoted from his judgment in *Powell & Wife v Streatham Manor Nursing Home* [1935] AC 243, p 267, of the possibility of judges being deceived by adroit or plausible knaves or by apparent innocence. Much to the same effect, though in more illustrative terms, is what Lord Devlin, quoting from MacKenna J. said in his book *The Judge* (1969) at p 63 and which I now reproduce:
>
> > The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is over-rated… I would adopt in their entirety (this being the highest form of judicial concurrence) the words of Mr Justice MacKenna:
> >
> > > I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part, I rely on these considerations as little as I can help.

[20] I will now consider the truthfulness of the plaintiffs' assertion and in doing so will take into account of the following factors:

(i) the existence of the memorandum of sublease between the plaintiffs and the defendant;

(ii) that the defendant is in law a separate legal entity to Lion Suzuki despite the fact that they are from the same group of companies;

(iii) tThat the memorandum of sublease was drafted by a legal firm — M/s Chong Brothers, Advocates, Kuching;

(iv) that there was an increase of RM4,000 in monthly rental (being 50% increase) from the previous tenancy making it a monthly rental of RM12,000;

(v) that the plaintiffs' claim for damages is for the sum of RM324,566.41;

(vi) that the memorandum of sublease is for the period of three years from 1 July 1997;

(vii) that the defendant gave notice to vacate on the 26 March 1998.

[21] Having considered and scrutinized the evidences adduced in respect of the above factors and the submissions advanced by the respective counsels, I am inclined to agree with the position taken by the defendant and I do so for the following reasons:

(i) There is no evidence to show why there was a 50% increase of the rental from RM8,000 to RM12,000. In my view, it is not reasonable for the defendant to accept an increase of 50% in monthly rental and be responsible for the damages caused by Lion Suzuki. On the contrary, it is more credible that the defendant accepts the increase with an understanding that the plaintiff would repair the demised premises.

(ii) Further, there is no dispute that the conditions of the demised premises at the start of the memorandum of sublease (November 1997) were not the same as that at the start of the tenancy between the plaintiffs and Lion Suzuki (July 1992).

(iii) To uphold the assertion of the plaintiffs would in fact infringe s 92 of the Evidence Act 1950 and also would be lifting the corporate veil of the defendant which in my judgment the plaintiff had failed to satisfy the conditions to do so. I shall deal with this subject in more details later in my judgment.

(iv) The claim by the plaintiffs is for some RM324,000 and if the same is upheld, the effective monthly rental payable by the defendant would be RM21,000 which is calculated as follows:

- RM9,000 + RM12,000 (present rental) = RM21,000
- RM9,000 is derived from dividing the sum
- RM342,000 (plaintiff s claim) by 36 months (tenure of the memorandum of sublease)

This calculation is done on the reasonable assumption that the defendant could not have caused the damages claimed for as it had only been in possession for only a period of one year and that the conditions when the defendant took over were not the same as in 1992.

No reasonable prospective tenant would have taken a sublease with such a monthly rental.

(v) The memorandum of sublease was prepared by the firm of M/s Chong Brothers, Advocates and I am of the view that cl (I)(5) of the memorandum of sublease would have been drafted differently had PW1 briefed the aforesaid firm of solicitors of his alleged desire to include a provision making the defendant responsible for the obligations of Lion Suzuki under the previous tenancies. The wordings appearing in cl (I)(5) of the memorandum of sublease with respect do not say what PW1 wants it to mean. To reflect PW1's alleged desire, cl (I)(5) should read like this:

> Notwithstanding any terms and conditions contained herein, the sublessee shall be responsible for any damages (except for wear and tear) caused to the demised premises by Lion Suzuki Sdn Bhd under the tenancy agreements dated 23 July 1992 and 28 July 1995 between the sublessor and Lion Suzuki Sdn Bhd' or…
>
> Notwithstanding any terms and conditions contained herein, this sublease is an extension of tenancy agreements dated 23 July 1992 and 28 July 1995 between the sublessor and Lion Suzuki Sdn Bhd and to avoid any doubts, the sublessee shall be responsible for any damages (except for wear and tear) caused to the demised premises by Lion Suzuki Sdn Bhd during the period of the aforesaid tenancies agreements

[22] Even if there is ambiguity in the interpretation of the above clause (in my view there is none), it should be read contra proferentum the plaintiffs as the tenancy agreement was drafted by their solicitors, M/s Chong Brothers and now being relied on by them. What that means is that the plaintiffs cannot say that the defendant is the alter ego of Lion Suzuki.

[23] To complete this part of my judgment, I shall now deal with the submissions of the plaintiffs' learned counsel, Mr James Lo who submitted that the defendant is in law and fact estopped from denying that the memorandum of sublease is a continuation of the previous tenancy agreements between the plaintiffs and Lion Suzuki. He relied, inter alia, on the letter (exh 28 P42) from one Mr Vincent Lee who made it a point to write that the defendant had been 'a very good tenant for the last five years'. This letter must be viewed together with the other evidences especially to the undisputed fact that Lion Suzuki and the defendant are separate legal entities from the same group of companies. But equating that to the conclusion that the memorandum of sublease is only an extension of the two previous tenancies with Lion Suzuki would completely ignore the considerations set out by me in my earlier part of my judgment. Further, the contents of P42 are hearsay evidences (see *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 6 MLJ 593) and if the plaintiffs wanted to use the same to prove their case, they should have called Mr Vincent Lee to testify what he actually meant by those words. As stated earlier, the burden is on the plaintiffs to prove this fact as it is them who are alleging it.

[24] Further, the independent legal entity theory is still applicable to companies within a group enterprise as in this case. As pointed out by the learned authors in *Chan & Koh on Malaysian Company Law* (2nd Ed) at p 110 which 1 now quote:

> It is a cardinal principle of company law that each company in a group is a separate legal entity possessed of separate legal rights and liabilities independent of the others. The fact that an individual holds practically all the shares in a company may give him control of the company but the business carried out by that company does not thereby become his business, not does it make the company his agents for the carrying on of the business. The proposition is just as true if the shareholder is itself a body corporate. The aggregate of all the fractions of shares collected in one or more hands does not constitute the shareholders the owners of the company's property. The starting point is that there is no general principle that all companies in a group are to be regarded as one. The independent legal existence of the constituent companies of the group has to be respected.

[25] Also in the case of *Perman Sdn Bhd v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97, Gopal Sri Ram JCA at p 110 said:

> Before concluding I would draw attention to the fact that it is not open to a court to disregard the corporate personality of a limited company save in very exceptional circumstances. In the very recent case of *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225 I ventured to colled and discuss some of the authorities which, in my view, represent the current jurisprudence in this area of the law. I find it unnecessary to repeal what I there said. Suffice to say that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts. See, *Woolfson v Strathclvde Regional Council* 1978 SLT 159. In the present instance, nowhere in the plaintiffs ' case is there any attempt to show that special circumstances exist indicating that the 1st defendant is a mere facade concealing the true facts.

[26] The plaintiffs had not shown nor attempted to show the special circumstances required for this court to lift the corporate veil of the defendant. Those special circumstances usually relate to fraud or improper purposes or scheme to avoid contractual obligations. Further, there is no evidence in court to show who the shareholders in the defendant are. Reliance by Mr James Lo, with respect, on the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 is misplaced. In that case, the appellant not only remained silent to the endorsement on the invoices imposing a 14 days period to raise any objection but had in fact made payments on some invoices with the aforesaid endorsement. No such conducts can be found in the present case. Mr James Lo also by a letter dated 30 May 2006 submits that the defense of 'Separate Legal Entity' was not pleaded. With respect, it is the plaintiffs who are alleging that the doctrine of separate legal entity does not apply and hence for them to prove why it does not apply. Thus, the question of the defendant's failure to plead the aforesaid doctrine is of no significance. In any event, Mr James Lo himself in his submission (encl 100) at p 3 para 9 acknowledges that the defendant does rely on the concept of separate legal entity.

[27] I concede that PW4 is a clumsy witness but having witnessed his demeanors and weighing his evidences to other evidences, I find his evidences to be more credible than PW1's evidences which with respect do not stack up to the considerations I relied on in interpreting cl I(5) of the memorandum of sublease. Accordingly I hold that the memorandum of sublease is a sublease between the defendant and the plaintiffs and not between a defendant who stepped into the shoes of Lion Suzuki and the plaintiffs. Hence, the defendant's responsibility under the memorandum of sublease arises only from the date of the same which is 20 November 1997.

[28] I come now whether or not the plaintiffs had proved the damages they had suffered. The way in which the plaintiffs needed to discharge this burden is clearly set out in the case of *New Chew v KBC Sawmill Sdn Bhd & Anor & another case* [1998] 1 CLJ Supp 49 by Richard Malanjum J (as he then was) where at pp 48–50 he said:

> Besides claiming for the refund of the repayments for the machinery, the plaintiff is also claiming for damages for the loss of the benefit of the said agreement. To begin, I can do

no better than to quote what his Lordship Edgar Joseph Jr J (as he then was) has said in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 307: It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William* 109 ER 842).

And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* 172 ER 50; [1825] 2 C&P 109 and *Twyman v Knowles* 138 ER 1183. On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his oneman business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given. (See para 345 *McGregor on Damages* (15th Ed)). His Lordship also went on to say thus, at p 369: In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17, namely, that:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it'. Meanwhile I am also well-aware that an innocent party in a case of a breach of contract is entitled to compensation for any loss or damage caused to him. And that includes a party who has rightly rescinded a contract. (See: ss 74 and 76 of the Contracts Act 1950)…
>
> … The defendants did not adduce evidence to rebut what was said by the plaintiff. Nor was there any challenge to the testimony by way of contradictory evidence…
>
> But learned counsel for the defendants submitted that the plaintiff failed to prove his loss and damage. According to him, the evidence consisted of conjectures and guess work without any independent evidence adduced. He also said that the plaintiff omitted to produce any record to substantiate his claim.
>
> Now, it is trite law that the plaintiff is only required to prove his damages on the balance of probabilities. The first consideration therefore is whether he has done so. In coming to a conclusion or finding on this point, I do not think it can be done by way of default, ie if the other party did not challenge or cross-examine a particular evidence, allegation or claim, then it is to be taken as the truth. In the first place such evidence, allegation or claim must not only be relevant and admissible but also sufficient or has a role to prove the element needed to be established on the standard of proof required under the law of evidence. There is no obligation for the opposite party to challenge apiece of evidence which may have no or very little probative value.

[29] In the present case, the plaintiffs as admitted by PW1 had not inspected the demised premises in 1997 when the defendant moved in, hence there is no starting point upon which the plaintiffs need to use to prove what damages the defendant caused during its occupancy. Accordingly, I dismiss the plaintiffs' claim under prayer 8(b) of the statement of claim except as to the costs of removal of the rubbish which the defendant had wanted to do but prevented from doing so and costs of the repair of damages caused by the removal of electrical sockets, lights, air conditioners and wiring from the office (see p 165 of notes of proceedings). There are enough evidences in court for me to make a finding of what those costs are. Accordingly, I award the sum of RM3,000 for the removal of rubbish and RM1,500 for the repair of damages caused by the removal of electrical accessories to the plaintiffs. In view of my conclusion above, there is no necessity for me to deal with agreed issues (2) and (3) set out above.

[30] In any event, even if I concede the plaintiffs' contention that the defendant is the alter ego of Lion Suzuki; the plaintiffs had failed to satisfy the guidelines set out in the case of *New Chew v KBC Sawmill Sdn Bhd*. Firstly, there is no detailed report of the condition of the demised premises when Lion Suzuki took occupancy in 1992. In fact, it was the defendant who tendered some 1992 photos (exh D10–19) showing only the superficial conditions of part of the demised premises and they were tendered to show that the concrete floors had cracks in them. Landlords like the plaintiffs here must prepare a detailed written and pictorial report of the conditions of the rented property for the tenants to sign and acknowledge before the start of the tenancy and another joint inspection of the rented property at the end of the tenancy. This is just common sense. No such report existed in this case. The court is left to but cannot speculate what the conditions of the demised premises were and whether or not the damages are from 'wear and tear' or otherwise. Nor is there any proof of whether or not the repairs were necessary or whether or not the repairs had restored the demised premises to the same conditions as at 1992. Nor is there any proof that the damages had been caused by Lion Suzuki. Take the claim for electrical rewiring of RM8,800 (Claim (i)). No witness was called to testify what the damages were, why rewiring was necessary and of course the costs of RM8,800. Also in respect of the claim of RM83,124.01 (Claim vii) which is a claim for the enhancement of existing concrete floor. The plaintiffs were fully aware that the defendant, Lion Suzuki and the previous tenant were in the business of selling cars and as such the movement of cars in the compound of the demised premises is unavoidable. Common sense will tell you that any damages done to the floors will be in the nature of wear and tear over the years unless proven otherwise. The allegation of damage done by the movement of dump trucks being sold by Lion Suzuki and the defendant remains an allegation. If the plaintiffs want the court to believe this allegation, they need to call a civil engineer to testify as to how dump trucks caused the alleged damages. None was called. What the plaintiffs did was to call PW2 who was the contractor for the repair works and did work as requested of by PW1. The plaintiffs' conducts in proving damages are as described by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 171 where he said: 'This is what I have lost, I ask you to give me these damages'. This is not proof at all. The court requires more, otherwise it will groping in the dark.

[31] I come now to agreed issue (1). The plaintiffs case stems from cl III(3) of the memorandum of sublease which states that the defendant/sublessee can terminate the sublease by giving a three months notice to the plaintiffs/sublessors who shall be entitled to forfeit the deposit of RM36,000 (deposit). There is no dispute that the defendant gave a notice to terminate pursuant to cl III(3) by a letter dated 26 March 1998 (exh P43). The defendant's contention is that because of the plaintiffs failure to repair the demised premises, the plaintiffs are not entitled to forfeit the deposit and the sum of RM12,000 being the outstanding rental for the month of June 1996 should be offset against the deposit. This contention is inconsistent to exh P43, para 6 the statement of agreed facts set out above and the defendant's failure to claim for the balance of RM24,000. Accordingly, I answer issue (1) in the affirmative. My rejection of the defendant's contention that it vacated the demised premises because of the failure by the plaintiffs to repair the same has no bearing on my interpretation of cl I(5) of memorandum of sublease as my primary consideration is in the words employed in the same (see *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 AMR 410). Further, the defendant's contention on this issue is in fact a non starter as it is contrary to para 6 of the statement of agreed facts.

[32] In respect of the defendant's counterclaim of RM19,586, the defendant did not attempt to prove it and by implication had abandoned the counterclaim. Mr John Shek, learned counsel for the defendant, in fact confirmed this.

[33] For reasons given above, I make the following order:

(i) Judgment in the sum of RM16,500 for the plaintiffs.

(ii) Interests under the Civil Law Act 1956 at 4% pa from the date of the writ of summons until the date of this judgment.

(iii) Statutory interests of 8 % from the date of this judgment until the date of full payment by the defendant.

(iv) The defendant's counterclaim of RM19,586 is dismissed.

[34] As for costs, I order each party to bear its own as the plaintiffs had not fully proved their case and the defendant had failed in its counterclaim.

Order accordingly.

Reported by Loo Lai Mee